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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	CS Docket No. 96-60
Leased Commercial Access	)	

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REPLY COMMENTS OF THE TRAVEL CHANNEL

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TABLE OF CONTENTS

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REPLY COMMENTS OF THE TRAVEL CHANNEL

The Travel Channel, by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The comments in this proceeding confirm that the Commission's proposed changes to the commercial leased access ("CLA") rules should not be adopted. In particular, the comments reflect widespread support for the following principles:

- The proposed changes to CLA will have an irrevocably negative impact on programmers, cable operators, and consumers.
- There is no need for the Commission to alter CLA because the Congressional goal set out in the CLA statute -- increasing programming diversity -- already has been achieved.
- Moreover, expert economic analysis demonstrates that the current highest implicit fee ("HIF") formula produces a reasonable CLA rate. By contrast, the

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1 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Commercial Leased Access, CS Docket No. 96-60, *Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-122 (released March 29, 1996) ("Notice").

proposed CLA formula was the subject of broad opposition among commenters, including several CLA programmers.

- The Commission should not mandate preferential tier placement for CLA programmers or require cable operators to designate CLA channels prior to demand for such channels.

- If the Commission chooses to disregard the record and to implement the proposed rules, a transition period is necessary and lawful.

II. NO CHANGE TO THE CURRENT CLA RULES IS JUSTIFIED

Approximately sixty companies commented on the Commission's proposed changes to CLA. Approximately fifty commenters either outright opposed the Commission's proposed formula (and many opposed any other changes to the CLA rules),[2] objected to the

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[2] See Comments of Turner Broadcasting System, Inc., News Corp., Ltd., and C-SPAN ("Turner Joint Comments"); A&E Television Networks, Courtroom Television, NBC Cable and Ovation ("A&E Joint Comments"); Time Warner Cable; USA Networks, Inc.; LifeTime Television; Intermedia Partners and Armstrong Utilities; Cox Communications, Inc.; Continental Cablevision; Comcast Cable Communications; Adelphia Communications, Corp., Century Communications, Corp., Falcon Holding Group, L.P., Insight Communications, Inc., Lenfest Communications, Inc. ("Adelphia Joint Comments"); National Cable Television Association ("NCTA"); Buckeye Cablevision; Tele-Communications, Inc. ("TCI"); Joint Comments of Cable Television Operators (Daniels Communications, *et. al*); US West; Rainbow Programming Holdings; The Plunkett Family; Multimedia Cablevision, Inc. and Susquehanna Cable Co.; Small Cable Business Association; Summit Communications; Tele-Media Corporation of Delaware; Encore Media Corp.; Motion Picture Association of America ("MPAA"); Prevue Networks, Inc.; Faith & Values; Liberty Sports; International Cable Channel Partnership; E! Entertainment Network, Television Food Networks, America's Health Network, NorthWest Cable News and The Providence Journal Co. ("E! Entertainment Joint Comments"); C-SPAN and C-SPAN 2; PBS Horizons Cable; Access Television Network; ESPN; Home & Garden Television; Shop-At-Home; Viacom; Inc.; The Discovery Channel; Outdoor Life, Speedvision, Golf Channel and BET on Jazz ("Outdoor Life Joint Comments").

proposed formula as unduly complicated and unmanageable, or proposed an alternative formula.[3] This broad opposition, coupled with the fact that Congress' goals with respect to CLA already have been achieved, suggests strongly that the Commission should retain the current CLA regulatory structure. This conclusion is buttressed by expert economic analysis submitted in this proceeding which demonstrates that the current HIF formula results in a reasonable CLA rate.

A. The Congressional Goal of Increasing Programming Diversity Has Been Achieved

As a majority of commenters stated, Congress' goals with respect to programming diversity have been achieved. Therefore, there is no need to further subsidize CLA rates. More than 128 different national programming networks compete for access to cable systems, nearly half of which are not affiliated with any cable operator.[4] In addition, there are over 45 regional and

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[3] See Comments of BLAB Television Network; Producer Mark Kliem; Lorilei Communications; R.K. Productions; Prime Radiant Productions; Broadcasting Systems, Inc.; Viking Communications; America's Public Television Stations and PBS; Community Broadcasters Association; United Broadcasting ("Telemiami"); Hispanic Information and Telecommunications Network ("HITN"); Video Information Providers for Non-Discriminatory Access ("VIPNA"); and the Vacation Channel.

[4] See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Second Annual Report*, CS Docket No. 95-61, 11 FCC Rcd. 2060 (1995) at ¶¶ 10, 19 and 150 ("1995 Video Competition Report) (there were more than 128 national cable networks at the end of 1994.) Other sources cite as many as 137 national cable networks as of 1995. See National Cable Television Association, Cable Television Developments (Spring 1996) at 6.

numerous local programmers offering additional diverse services.[5] Over eighty new networks are preparing for launch; sixty-two of which (78%) are unaffiliated with any cable operator.[6] The Commission's PEG, must-carry and channel occupancy rules provide additional unaffiliated programming sources. As one commenter stated, "[t]he type of programming that was originally thought could only be provided by [CLA] users is now commonplace."[7] Since there is no lack of unaffiliated program sources, the promulgation of rules to artificially stimulate demand for CLA is unnecessary.[8]

Moreover, The Travel Channel and many other non-CLA programmers are at risk of being displaced by CLA programmers if the proposed rules are adopted.[9] Given the satisfaction of

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5 Cablevision, Blue Book, Vol. III at 48 (1996).

6 1995 Video Competition Report at ¶ 19 and Appendix H, Tables 3 and 4.

7 Joint Comments of Cable Television Operators at 6.

8 The video programming marketplace is "robustly competitive." USA Networks Comments at 5; A&E Joint Comments at 7; MPAA Comments at 2. Indeed, both affiliated and unaffiliated programmers compete with each other, and CLA programmers, for limited channel capacity and audience shares. See "New Networks Fight for Space," Broadcasting & Cable at (April 29, 1996) at 61. ("Nearly 100 new cable networks have dreams of becoming mainstays in millions of cable households, but the reality is that in the highly competitive world of limited channel capacity, most of them don't have a snowball's chance. . . " "Only a very small percentage will break through and find economic viability."). Id.

9 See TCI Comments at 8-9. TCI concluded that, if the proposed rules were implemented, it would have to delete between four and nine channels on each system. The services tentatively designated for deletion include: C-SPAN, CNBC, ESPN 2, A&E, Bravo, AMC, Faith & Values, CNN-Headline News, The Comedy

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Congress' diversity goals, there is no reason for the Commission to take the real risk that changes to the CLA rules will cause substantial and widespread harm to existing programmers. In fact, the programming services that are at risk if the Commission changes the CLA rules are valued by consumers and provide the very type of diversity Congress sought. Therefore, any effort to create CLA demand that displaces these programming services (and replaces them with CLA services consumers do not value) carries with it the additional risk of decreasing diversity.[10]

B. The Current Highest Implicit Fee Formula Fulfills the Commission's Responsibility to Find A CLA Rate That is Reasonable Without Causing Substantial Harm To Cable Operators

Numerous parties demonstrated that the HIF formula results in a reasonable CLA rate and that the Commission's concerns with the HIF formula are unfounded. For example, TCI stated that "[t]he highest implicit fee formula has proven to be a reasonable approach to the problem of arriving at a leased access price which adequately compensates the cable operator and avoids the

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Channel, Court TV, The Weather Channel, Discovery Channel, VH-1, The Learning Channel, fX and LifeTime Television.

[10] See Comments of Faith & Values at 4; Home & Garden at 2; Time Warner at 36; A&E Joint Comments at 27; Prevue Networks at 2; Turner Joint Comments at 2, 9; C-SPAN and C-SPAN 2 at 7; E! Entertainment Joint Comments at 3; International Cable Channel Partnership at 6; Liberty Sports at 1, 5; Buckeye Cablevision at 2. "[T]he bulk of potential leased access programming today has been in the form of less expensive shopping or informercial programs for which there is apparently insufficient consumer demand." Continental Comments at 2.

problem of service migration."[11] In fact, cable operators pointed out that they carry many CLA programmers pursuant to the current rate formula.[12] Similarly, several CLA programmers reported in their comments that they were able to obtain capacity on cable systems using the current HIF formula.[13] If the HIF formula produced an unreasonable rate, such CLA usage would not be occurring.

Thus, it is not surprising that the current CLA rules result in very few complaints. As the Travel Channel cited in its

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[11] Comments of TCI at 19. See also Comments of Adelphia at 3, 6; Buckeye Cablevision at 7-8; Cox Communications at 3-4, 9; Cable Television Operators at 7, 11; Home & Garden at 2; and Comcast at 2, 12. In fact, the Besen and Murdoch economic analysis appended to TCI's comments states that the HIF formula "understates the true maximum implicit access fee that a cable operator currently realizes." TCI Comments, Appendix A, An Economic Analysis of the FCC's Cable Leased Access Proposal, Charles Rivers Associates (1996)("Besen/Murdoch Analysis") at 19 (emphasis added) (citation omitted).

The comments also prove that the HIF formula does not, as the Commission suggests, result in double recovery. Notice at ¶ 29. Subscribers do not value all channels equally, so it is illogical to divide the subscriber fees an operator receives for a tier of service by the number of channels on that tier to come up with their individual value. See Comments of Cox Communications at 6; Time Warner at 9; NCTA at 19-20; Continental Cablevision at 6; Adelphia at 7-8; Cable Television Operators at 11; and Comcast at 11-12. In addition, the Besen and Murdoch Analysis points out that the double-counting issue "ignores the fact that leased access services render the cable operator's package less attractive to subscribers." Besen/Murdoch Analysis at fn. 31.

[12] See Comments of Cox Communications at 2 and Exhibit A; Time Warner at 3; Buckeye Cablevision at 4; US West at 7.

[13] See Comments of Beach TV at 1; Telemiami at i; Lorilei Communications at 7; BLAB Television Network at 1; R.K. Production Company at 1; Viking Communications at 1; Vacation Channel at 2.

comments, only a minuscule number of complaints have been filed since the rules were revised in 1993, many of which have been dismissed or address issues unrelated to CLA rates.[14] Indeed, the current Rulemaking was inspired by the criticism of only six parties.

III. THE FCC SHOULD NOT COMPEL PREFERENTIAL TIER PLACEMENT FOR CLA PROGRAMMERS OR REQUIRE CABLE OPERATORS TO DESIGNATE CLA CHANNELS PRIOR TO DEMAND FOR SUCH CHANNELS

The Notice correctly recognizes that "Congress did not mandate specific tier or channel location for leased access, as it did for PEG channels."[15] Commenters in support of mandatory tier placement rely on legislative history indicating that CLA should provide a "genuine outlet for programmers." However, this is a general statement regarding the effectiveness of CLA, not an express congressional mandate for tier placement.[16] Indeed, mandatory tier placement is contrary to Congress' recognition that cable operators be allowed to consider how CLA will "affect the marketing of the mix of existing services being offered. . . to subscribers, as well as potential market fragmentation that might be created and any resulting impact that might have on subscriber or advertising revenue."[17]

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14 Travel Channel Comments at 14.

15 Notice at ¶ 116 (emphasis added).

16 Game Show Comments at 22-23; ValuVision Comments at 23.

17 H.R. Rep. No. 934, 98th Cong. 2d Sess. (1984) ("1984 House Report") at 51; Indeed, the Commission has previously recognized that Congress did not include CLA channels as part of its basic tier definition and concluded that "packaging by

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Moreover, there is no policy basis for the Commission to favor CLA programmers with preferential tier treatment. Rather, CLA programmers are commercial ventures and should have to negotiate for tier placement just like the Travel Channel and other programmers. The Travel Channel and other non-CLA programmers have made a substantial investment in programming that has encouraged cable operators to offer them channel capacity. They should not be exposed to summary displacement merely because a few CLA programmers are upset that they cannot generate the same interest in their programming.

It is essential that the Commission recognize that there is a significant economic value to carriage in the basic or enhanced service tier.[18] Economists Besen and Murdoch note that a tier requirement would permit CLA providers to "free ride" on the "spillover" benefits generated by carefully crafted programming

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regulation was inappropriate and would not achieve the required balance with the 'legitimate needs of cable operators to market their programming.'" Encore Media Comments at fn. 2 (*citing* In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 5631 at ¶ 498 (May 3,1993)); See also S. Rep. No. 92, 102nd Cong., 1st Sess. (1992) at 79.

18 See USA Network Comments at 7; NCTA Comments at 16 and Appendix A, An Analysis of the Federal Communications Commission's Maximum Reasonable Leased Commercial Access Rate, Economists Incorporated at 3, 15 (May 15, 1996) ("EI"). "The right to be placed on a tier represents another subsidy to the leased commercial access programmer." EI at 15.

packages.[19] The selection, packaging and monitoring of programming is the most important activity of the cable operator and its success in this area generates revenues for both operators and programmers. Besen and Murdoch find that the loss of the operator's ability to create programming packages free of regulatory intrusion will harm programmers that remain on the same tier as a new CLA programmer because CLA programmers will weaken the tier and make it less valuable to subscribers and potential advertisers.[20] This result would inevitably do substantial harm to the operator, contrary to the Congressional directive that the Commission "do no harm" in its implementation of CLA.

Similarly, the Commission should not require operators to select the channels they will designate for CLA and identify them

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19 TCI Comments at 25 and Besen/Murdoch Analysis at 13. By obtaining tier placement, a CLA programmer is "free-riding on the strength of other cable networks on that tier, rather than generating a demand for its product itself. By piggy backing on the goodwill that other programmers and the operator have created, a lessee receives significant benefits that are not accounted for in the cost-based model from inserting itself into a package that is already highly penetrated into subscribers' homes." NCTA Comments at 16-17; EI at 15; Turner Broadcasting Comments at 6 (The Commission's proposal would allow CLA providers to "free ride on the efforts of cable operators and programmers who have spent years creating a valuable product, while diminishing the value of that same product."). _Id._ This will result in an unfounded windfall for CLA programmers and substantial detriment to programmers like The Travel Channel.

20 Turner Joint Comments, Exhibit A, Stanley M. Besen and E. Jane Murdoch, _The Impact of the FCC's Leased Access Proposal on Cable Television Program Services_, at 2 (May 15, 1996) ("Besen/Murdoch Report"). A significant measure of a cable channel's value depends on the value of the channels that surround it.

in their public file in advance of any demand.[21] As A&E noted in its comments, this requirement is "tantamount to creating a 'death row'" for programmers on the list, "which would impair the named services' ability to attract viewers, advertisers, investors and quality programming from third-party suppliers."[22] The wholesale dropping of existing programming services was not Congress' intent. Rather, Congress intended for cable operators to reach the CLA set-aside requirement as demand for CLA developed.[23] The proposal that operators designate CLA channels in advance of demand is at odds with that intent.

IV. IF THE COMMISSION FEELS COMPELLED TO DISREGARD THE COMMENTERS' CONCERNS AND ADOPT NEW CLA RULES, A TRANSITION PERIOD IS NECESSARY AND LAWFUL

As noted, the comments in this proceeding demonstrate that the existing CLA rules are reasonable and that the proposed changes to those rules would severely harm programmers, cable operators and consumers. Therefore, the Commission should not

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[21] Notice at ¶ 76.

[22] A&E Joint Comments at 14. In addition, cable operators demonstrated that this requirement would affect negotiations with non-CLA programmers for channel capacity, render them unable to respond to customer demand with respect to programming and place them at a disadvantage with respect to competing multi-channel video program distributors ("MVPDs"). See Cox Communications Comments at 19-20; Comcast Comments at 19. As such, it would impermissibly harm operators in violation of Section 612(c)(1) of the Communications Act of 1934, as amended ("Communications Act").

[23] Congress expressly recognized that CLA might not be fully subscribed and provided that any unused CLA capacity be made available for programming selected by the cable operator. Communications Act § 612(b)(4).

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adopt the proposed changes. However, if the Commission decides to disregard the record and adopt changes to CLA, it should do so only through a transition period that phases in the new rules. The Commission has ample legal authority to adopt a transition period and significant public policy reasons for doing so.

A. The Commission Has Legal Authority and Precedent For Adopting A Transition Period For Any CLA Rule Changes.

The Commission has a legal obligation to oversee CLA in a manner that "will not adversely affect the operation, financial condition, or market development of the cable system."[24] Commenters have shown that changes to the CLA rules will cause harm. Therefore, at a minimum, the Commission has a legal obligation to minimize that harm. It can do so through the adoption of a transition period. A transition period also is permitted by the Commission's general authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[25]

Moreover, it is clear that an agency may adopt a transition period even in the absence of a specific statutory mandate.[26]

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24 Communications Act § 612(c)(1); 47 U.S.C. § 532(c)(1).

25 Communications Act § 4(i), 47 U.S.C. § 154(i).

26 See American Federation of Labor, etc. v. Marshall, 617 F.2d 636, 673 (D.C. 1979) (OSHA's use of a four-year implementation program that petitioners claimed lacked authorization under the OSH Act was deemed reasonable "to accommodate the competing needs of employers who need time to achieve compliance and the needs of employees who need protection from health risks." (*citing* Industrial Union v. Hodgson, 499 F.2d

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Indeed, transition periods have been deemed "appropriate to allow sufficient time to permit an orderly industry-wide transition."[27]

The Commission has in the past used its discretion to adopt transition periods where the statute did not specifically mandate a transition. For instance, in detariffing customer premises equipment and enhanced services, the Commission implemented a bifurcated transition plan, despite the fact the statute did not specifically require a transition period. The Commission believed that the transition would "avoid potential significant dislocations caused by an abrupt transition. . . and would allow steady progress towards a more competitive environment."[28] Furthermore, in implementing the 1992 Cable Act's rate regulation provisions,[29] the Commission adopted a transition period for cable systems owned by small operators.[30]

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467,479 (D.C. 1974)). See also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, *Report and* Order, 2 FCC Rcd. 947, 979 (1986) (Commission established fees for communications services and would not create additional exemptions from required fees because Congress had established a specific set of exemptions, waivers and deferral processes.).

27 Industrial Union at 479.

28 Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), *Report and Order*, 95 FCC 2d 1276, 1280 (1983) (citation omitted).

29 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act § 623 (a)-(c); 47 U.S.C. § 543 (a)-(c).

30 In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate

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Indeed, noted economists have agreed that the use of a transition period is "probably the approach adopted most frequently to deal with significant changes in government policy including regulatory policy."[31] Rapid transitions are not preferred when the changes would be "distressing were they to occur in a short period of time."[32]

The Travel Channel and other programmers have invested and must continue to invest substantial capital to develop and strengthen their services.[33] Programming investments are

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Regulation, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd. 4119 (1994) at ¶¶ 117-122.

31 Darius W. Gaskins, Jr. and James M. Voytko, "Managing the Transition to Deregulation," 44 Law and Contemporary Problems (Winter 1981) at 20.

32 Id. at 30. "[S]peed is acceptable when a rapid movement to the market will not violently distress parties." Id.

33 Turner Joint Comments at 6; ESPN at 4; LifeTime Television Comments at 5-6; MPAA Comments at 3; E! Entertainment Joint Comments at 4 ("The Networks' initial business plans, subsequent budgets and future financial commitments are based on this [existing] economic model."); Outdoor Life Joint Comments at 17-20 (Launching a new network often costs $100-125 million. Other channels, like The Golf Channel and BET on Jazz have invested tens of millions to create state-of-the art production centers. Indeed, "[a] programming network's expenses do not end once the network is launched. The annual cost of producing and acquiring programming is generally a network's most significant annual expense.") (*citing* Richard Mahler, "Struggling to Hook Up With Viewers," L.A. Times (April 29, 1996)); Time Warner Comments at 13 (stating that Microsoft and NBC plan to spend $620 million to roll out MSNBC while "Speedvision" projects its break-even point at $80-90 million), *citing* "The Birth of New Networks: A Comprehensive Guide to Tomorrow's Cable Programming," Cablevision: New Network Handbook (Special Supplement) (1996) at 16A.); PreVue Networks Comments at 3 (*citing* Richard Katz,

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generally made on a multi-year basis, i.e., programmers invest today in programming that will appear on their services for the next several years. Typically, a programmer will have investments in programming going out three to five years. Programmers make these investments based on a number of factors, including the availability of channel capacity for carriage of their services. In assessing channel capacity, programmers have relied on the level of CLA demand produced by the current CLA rules. If the Commission were to suddenly change the level of CLA demand, with no reasonable transition to allow operators and programmers to adjust to the change, it would create a very unstable business environment which could fundamentally undermine the investment strategies of the programming industry. There is no reason for the Commission to take this risk. Instead, if the Commission decides to modify CLA, it should recognize the programmer's reliance interests and adopt a transition that will reduce the negative impact of the modifications. This is particularly true in light of the fact that the substantial investments made by existing programmers have contributed to consumer welfare by increasing the quality, quantity and diversity of programming.

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"Discovery Networks to Spend $160 Million on New Shows," Multichannel News (May 8, 1995) at 54).

B. If The Commission Revises Its Current CLA Rules, It Should Do So Over Time And Prohibit Any Bumping Of Programmers Until Their Contracts Expire

A majority of the commenting parties support the use of a transition period to minimize the disruption that will be caused by new CLA rules. The Travel Channel reiterates its support for the following transition: (1) in year one, the current HIF formula is still used; and (2) the remaining phase-in of a new rate scheme is heavily back-loaded so that there are relatively modest rate decreases in the first few years and more substantial rate reductions in the later years.[34]

The Commission should also adopt a rule that permits incumbent non-CLA programmers to remain on the system until the expiration of their current affiliation contracts. These contracts were entered into between programmers and operators in good faith and in reliance on the current demand for CLA. Mandatory bumping would be disastrous for incumbent programmers and would result in tremendous consumer welfare losses.

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34 The Travel Channel Comments at 18-19.

CONCLUSION

For the foregoing reasons, The Travel Channel respectfully urges the Commission to make no changes to the CLA rate scheme. Alternatively, to the extent the Commission believes that changes to the CLA rules are necessary, it should proceed cautiously and utilize the transition period described above.

Respectfully submitted,

THE TRAVEL CHANNEL

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